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CITY AND COUNTY OF SAN FRANCISCO and  
SAN FRANCISCO POLICE CHIEF HEATHER FONG

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ANDREW COHEN, an individual;  
JAMES LEWIS, an individual,

Plaintiffs,

vs.

CITY AND COUNTY OF SAN  
FRANCISCO, HEATHER FONG, an  
individual, and DOES 1 - 50,

Defendant(s).

Case No. C07-06208 EMC

**DEFENDANTS' REPLY  
MEMORANDUM IN SUPPORT OF  
THEIR MOTION TO DISMISS  
(F.R.C.P. 12(b)(6))**

Date: January 30, 2008  
Time: 10:30 a.m.  
Courtroom: C, 15<sup>th</sup> Floor  
Hon. Edward M. Chen

Effectively conceding that their claims here are necessarily intertwined with their parallel claims of retaliation and intentional infliction in *Harmston*, Plaintiffs' opposition announces that "Plaintiffs are not opposing the pending motion by Defendants to consolidate this matter with the *Harmston* litigation." (Opp. Mem. at 2:4-5)<sup>1</sup> In light of this concession, and given the likelihood that the Court will merge the two matters as urged by Defendants, Defendants will not revisit the immunity arguments set forth in their opening brief and will instead address the totality of Plaintiffs' claims in their impending summary judgment motion in that case. If this Court elects to address Defendants' arguments on this motion, Defendants respectfully request leave to file a reply memorandum at that time, so as to avoid further undue burden and expense based on Plaintiffs' improper litigation tactics.<sup>2</sup>

Dated: January 16, 2008

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<sup>1</sup> Plaintiffs' late-filed opposition provides no explanation for refusing to stipulate to the consolidation in response to Defendants' repeated attempts to meet and confer on this issue prior to filing this motion.

<sup>2</sup> It is worth noting that Plaintiffs' argument that their retaliation claim does not arise out of the same primary right as the retaliation claim in *Harmston* is at best strained, and is irreconcilable with their belated concession that the two matters should be consolidated. Plaintiffs erroneously conflate the primary right asserted in each action (their legal right to be free from unlawful retaliation) with the underlying facts. See *Bay Cities Paving & Grading v. Lawyers' Mutual Insurance Company* (1993) 5 Cal.4<sup>th</sup> 854, 860 (contractor had single primary right to be free of attorney negligence notwithstanding that attorney breached duties in multiple instances, including by failing to serve stop notice and by subsequently failing to file foreclosure complaint).